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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

HOWARD SHELBY, Jr.,

Defendant and Appellant.

B289313

(Los Angeles County  
Super. Ct. No. BA455000)

APPEAL from the judgment of the Superior Court of Los Angeles County. Ray G. Jurado, Judge. Affirmed.

Mark Yanis, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle and Nancy Lii Ladner, Deputy Attorneys General, for Plaintiff and Respondent.

\* \* \* \* \*

Defendant and appellant Howard Shelby, Jr., appeals from his conviction by jury of one count of possession of a controlled substance with a firearm and one count of possession of a firearm by a felon for which he received a three-year state prison sentence. Defendant's sole contention on appeal is that the prosecutor committed prejudicial misconduct during her cross-examination of him.

We affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

In late January 2017, Detective Kevin Currie of the Los Angeles Police Department received a tip about possible drug sales occurring at a 10-unit apartment complex on West 82nd Street in the city of Los Angeles. The alleged activity was occurring in two units located near the back of the complex, one of which was later identified as defendant's apartment. Over a couple of days of surveillance at the location, Detective Currie saw eight different individuals go into the rear apartment, stay for a few minutes and then leave--activity, which in his experience, was consistent with drug trafficking.

Randy M. worked as an informant for the Los Angeles Police Department, and often with Detective Currie. He had made drug buys as an informant for close to 15 years. Randy was compensated for making drug buys, even when he was not successful in completing an attempted purchase. Randy admitted he had suffered five prior convictions for burglary, one for receiving stolen property and one for selling marijuana. His last conviction was in 2009.

On February 8, 2017, Randy worked as an informant for Detective Currie and went to the apartment complex on West 82nd Street to attempt a drug purchase. Detective Currie told

him the two back units were the suspected sales locations. Randy was not familiar with defendant and denied ever meeting him, knowing him from the neighborhood or ever being at the apartment complex. Outside the apartment complex, Randy met a woman who was also going inside to buy drugs. When Randy got inside defendant's apartment, defendant had a plate with some cocaine "crumbs or dust" on it. The woman who had walked in with him bought what was on the plate. Another man in the apartment directed Randy to the apartment behind defendant's and he was able to make a purchase there, but did not buy any drugs that day from defendant.

On February 16, 2017, Detective Currie had Randy return to defendant's apartment to attempt another purchase. When he entered the apartment, defendant and another man later identified as Wayne Adams were sitting on the couch. Randy purchased \$20 worth of "rock cocaine" from defendant. Detective Currie described it as a "usable amount" of cocaine base (three off-white pieces). The money used for the purchase was marked currency provided by Detective Currie. Randy did not see any guns in the apartment while he was there. He was inside for just a minute or two.

Approximately 30 minutes later, Detective Currie and several other officers effectuated a search warrant at defendant's residence. Both defendant and Mr. Adams were detained. During the search, the officers recovered a plate near the couch containing loose pieces of cocaine base, a "larger quantity of cocaine base," some other narcotics that appeared to be ecstasy and methamphetamines, a loaded semiautomatic handgun, a revolver, and ammunition. One of the firearms was found tucked

into the couch in the living room. A “stack of money” totaling \$13,990, and a separate amount totaling \$218 were also found.

In addition, the search of defendant’s apartment produced mail with defendant’s address verifying the location as his residence (utility bills), two cell phones, empty baggies and baggies containing what appeared to be narcotics, as well as a digital scale and a razor blade on the living room floor. All of the recovered items were photographed and booked into evidence.

Defendant was charged by information with four felonies: sale/transportation of controlled substance, cocaine base (Health & Saf. Code, § 11352, subd. (a) [count 1]); possession of a controlled substance, cocaine base, with a firearm (Health & Saf. Code, § 11370.1, subd. (a) [count 2]); possession for sale of cocaine base (Health & Saf. Code, § 11351.5 [count 3]); and, possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1) [count 4]). As to counts 1 and 3, it was further alleged that defendant was armed with a firearm during the commission of the offense (Pen. Code, § 12022, subd. (c)), and had suffered a prior conviction for a violation of Health and Safety Code section 11352 (Pen. Code, § 1203.07, subd. (a)(11)).

The case proceeded to a jury trial in October 2017. Detective Currie and Randy attested to the above facts concerning the events of February 2017.

Defendant testified in his own defense. He said he had lived in his apartment on West 82nd Street for over seven years and had been working at the same pawn shop for over 20 years. He explained the money found in his apartment was his savings, from work and from betting on sports with friends. Defendant did not like using banks because he did not trust them. He admitted to having small quantities of cocaine and marijuana in

his home for personal use. He also admitted to having a prior conviction in 1996 for “drug sales,” but denied having sold any drugs since that time. Defendant said he allowed many friends, like Mr. Adams, to stay with him when they were in need of a place to stay and they often left items in his home. He denied knowledge of the quantity of cocaine recovered from his home after his arrest. Defendant also admitted he had a gun for self-defense, to “protect my home,” because it was necessary to have one in his neighborhood to avoid being a victim. Defendant said he believed the gun was no longer in his home as of February 2017 because it was inoperable.

With respect to Randy, defendant said they were not friends but he had seen him around the neighborhood for years. He had “turned . . . down” Randy when he attempted to “fence” items, including a car radio, in the parking lot of the pawn shop where he worked.

Defendant testified to seeing Randy around his apartment complex “the whole month of February” 2017, and sometime specifically a day or two before February 16. Randy was “just loitering.” At one point, defendant told Randy to leave and quit hanging around because he knew he was “a thief.” During this same time period, defendant also believed the complex was under police surveillance because someone else who lived there had been arrested by Detective Currie. There were rumors that Randy might be “working with the police.”

During his testimony, defendant repeatedly had difficulty recalling dates and distinguishing what took place on February 8 as opposed to February 16, 2017. However, he said that Randy spoke with Mr. Adams and conducted some business “real fast” and he did not know what they were talking about. Defendant

said when he realized who Randy was, he told him to leave his home.

The jury found defendant guilty on count 2 (possession of a controlled substance with a firearm), and on count 4 (possession of a firearm by a felon). The jury was unable to reach a verdict as to counts 1 and 3, and the court declared a mistrial. Counts 1 and 3 were subsequently dismissed. Defendant's postverdict request to proceed in propria persona pursuant to *Faretta v. California* (1975) 422 U.S. 806 was granted.

The court sentenced defendant to a three-year state prison term calculated as follows: a midterm of three years on count 2 (the base count), and a concurrent two-year midterm on count 4. The court awarded defendant 196 days of custody credits and imposed various statutory fees.

This appeal followed.

### DISCUSSION

The sole issue before us is whether the prosecutor committed reversible error during her cross-examination of defendant.

“The applicable federal and state standards regarding prosecutorial misconduct are well established. “ ‘A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct “so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.” ’ ” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves “ ‘the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.” ’ ” ’ ” (*People v. Hill* (1998) 17 Cal.4th 800,

819; accord, *People v. Fuiava* (2012) 53 Cal.4th 622, 679 (*Fuiava*).)

During his direct testimony, defendant testified that he saw Randy loitering around his apartment complex a day or two before defendant was arrested on February 16, 2017, and that Randy spoke to him, making some passing comment like “you’re still around here?” On cross-examination, the prosecutor asked if that happened in “early February” and defendant said yes, “early February.”

The following colloquy, of which defendant complains, then ensued.

“[PROSECUTOR]: Okay. And would it surprise you to actually learn that [Randy] was actually in the hospital for the entire first part of February?

“[DEFENSE COUNSEL]: Objection. Assumes facts not in evidence. Counsel’s testifying.

“THE COURT: Sustained.

“[DEFENSE COUNSEL]: Move to strike.

“THE COURT: No answer, but if there was, it’s stricken.

“[PROSECUTOR]: Are you aware that [Randy] was actually in the hospital?

“[DEFENSE COUNSEL]: Objection.

“[DEFENDANT]: No.

“[DEFENSE COUNSEL]: Same objection.

“THE COURT: Overruled.

“[PROSECUTOR]: No? Are you aware [Randy] was in the hospital at the beginning of February?

“[DEFENDANT]: No.”

Defendant argues there was no evidence in the record that Randy had been in the hospital. Therefore, the prosecutor in

essence presented unsworn testimony through her questioning about facts outside of the record intended solely to undermine defendant's credibility. Defendant argues he is not required to show bad faith, but that the bad faith of the prosecutor can be inferred by the fact she continued to ask variations of the question after the court sustained defense counsel's objection.

We are not persuaded. First, the prosecution presented evidence that Randy was at defendant's complex on February 8, 2017, and then again on the February 16 when defendant was arrested. Defendant twice said he thought the day when Randy made the comment to him was a day or two before, or a couple of days before, his arrest on the February 16. Defendant also expressed difficulty remembering specific dates and then confirmed on cross-examination that the comment occurred in "early February." The prosecutor's assertion that Randy had "actually" been in the hospital during the vaguely defined "first part" of February was not significant given the balance of the testimony on this issue. It certainly did not result in a trial so fundamentally unfair as to amount to a denial of due process.

Moreover, even assuming, solely for the sake of argument, that it was error for the prosecutor to ask the question in the manner she did, defendant cannot show prejudice. (*Fuiava*, *supra*, 53 Cal.4th at p. 679 [a defendant must show that "it is reasonably probable" that without the alleged misconduct "an outcome more favorable to the defendant would have resulted"].)

Here, the testimony about and by Randy was relevant only to counts 1 and 3 regarding the sale of cocaine base, and the jury hung on these two counts. The jury's inability to reach a verdict on these two counts reflects the individual jurors were

independently assessing the evidence and were not unfairly coerced by any alleged misconduct into returning guilty verdicts.

Defendant was convicted only on count 2 for possession of cocaine base with a firearm and count 4 for possession of a firearm by a felon. Defendant's own testimony constituted significant proof in support of those offenses. Defendant admitted to having possession of cocaine in his home, as well as having a firearm for protection. Defendant also stipulated to having a prior felony conviction. As already explained above, the challenged colloquy with the prosecutor was not a significant portion of defendant's testimony. To the extent it was relevant to his credibility, we do not believe it was more significant than defendant's waffling testimony about the events of February 8 and February 16, 2017, and his admissions.

Further, the issue was not argued or highlighted in any way during closing argument. And, the court instructed with CALCRIM No. 222 which includes the following language: "Nothing that the attorneys say is evidence. . . . Do not assume that something is true just because one of the attorneys asked a question that suggested it was true."

Defendant has not shown it is reasonably probable he would have obtained a more favorable outcome had the objected to colloquy not occurred.

#### **DISPOSITION**

The judgment of conviction is affirmed.

GRIMES, Acting P. J.

WE CONCUR:

STRATTON, J.

WILEY, J.